

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF LAPSED PERMIT)	
NO. 37-7460 IN THE NAME OF)	FINAL ORDER
FRANK AND/OR JOSEPHINE)	
ASTORQUIA)	
_____)	

This matter came before the Idaho Department of Water Resources ("Department") as a PETITION TO REINSTATE PERMIT AND ORIGINAL PRIORITY DATE filed by the permit holder, Frank Astorquia. In response to the petition, the Department issued a preliminary order reinstating the permit and advancing the priority date of the permit to the date of the filing of the petition on July 3, 2002. The permit holder filed a timely Exception to the Preliminary Order, with a supporting memorandum, objecting to the advancement of the permit priority date, and requesting oral argument before the Director. The Director, having reviewed the Preliminary Order, the Exception and the supporting memorandum, makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On December 5, 1975, the Department issued Permit No. 37-7460 to Frank and/or Josephine Astorquia ("permit holder") authorizing the diversion of 6.40 cubic feet per second (cfs) of ground water to be diverted in Lot 2 (NW1/4NE1/4) Section 2, T6S, R14E, B.M. for irrigation of 320 acres within the N1/2 of Section 2, Township 6 South, Range 14 East, Gooding County, B.M. A condition of permit approval required the permit holder to submit proof of beneficial use of water ("proof") to the Department on or before December 1, 1980.
2. On September 3, 1980, the Department notified the permit holder that proof of beneficial use ("proof") was due and instructed the permit holder of the steps to be taken to submit the proof or an extension of time request.
3. On December 4, 1980 the Department sent the permit holder a lapse notice, since the Department had not received an acceptable proof or extension of time request.
4. On January 7, 1981, the permit holder submitted a completed Request for Extension of Time form ("extension request") and associated fee for the extension request to the Department. The printed form states it is "To provide additional time in which to submit proof of beneficial use on a water right permit." In describing the work completed, the permit holder stated on the form that, "Well has been dug, and 200

acres are being irrigated.” The permit holder further stated, “Because of moratorium on new power hookups, I cannot get enough electrical power to pump water for the other 120 acres.”

5. The Department approved the January 7, 1981 extension request on January 9, 1981, reinstating the permit and advancing the priority date of the permit to November 26, 1975. The extension approval established January 1, 1984 as the new date for submittal of proof of beneficial use under the permit.

6. On October 31, 1983, the Department notified the permit holder that proof was due and instructed the permit holder of the steps to be taken to submit the proof or an extension request.

7. On January 4, 1984, the Department sent a lapse notice to the permit holder, since the permit holder did not submit either proof or an extension request. On March 5, 1985, the permit became of no force nor effect as provided in Section 42-218a, Idaho Code. The plain meaning of the language in the Proof Due Notice dated October 31, 1983, and in the Lapse Notice dated January 4, 1984, is that the notices applied to the entire permit, not just to a portion of the permit.

8. On July 3, 2002, the permit holder submitted a PETITION TO REINSTATE PERMIT AND ORIGINAL PRIORITY DATE together with the required license examination fee to the Department. The permit holder also submitted a completed proof form and evidence to show that water has been applied to the authorized beneficial use during the development period and has shown sufficient cause why the beneficial use was not timely submitted.

9. On July 11, 2002, the Department issued a PRELIMINARY ORDER REINSTATING PERMIT advancing the priority of use to the date that proof was submitted to the Department as provided in Section 42-218a(2), Idaho Code.

10. On July 25, 2002, the permit holder filed EXCEPTION TO PRELIMINARY ORDER and on August 23, 2002 submitted FRANK ASTORQUIA'S MEMORANDUM IN SUPPORT OF EXCEPTION TO PRELIMINARY ORDER and requested oral argument before the Department.

11. The basis for the Exception is that the Preliminary Order does not address the permit holder's request that the Department reinstate the original priority date of the permit. In support of the Exception, the permit holder argues that the statement in the 1981 Request for Extension that 200 of the 320 acres authorized had been developed should constitute submittal of proof of beneficial use as to the 200 acres developed, thus justifying retention of the original November 26, 1975 priority date as to the developed acres.

CONCLUSIONS OF LAW

1. Section 42-217, Idaho Code, provides in pertinent part as follows:

On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit. The statement shall include:

1. The name and post-office address of the permit holder.
2. The permit number.
3. A description of the extent of the use.
4. In the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation.
5. The source of water used.
6. Such other information as shall be required by the blank form furnished by the department.

Such written proof as may be required to be submitted by such user shall be upon forms furnished by the department of water resources....

2. Section 42-218a, Idaho Code, provides as follows:

A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided:

1. That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof;
2. That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;
3. The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department.

3. The permit holder did not timely submit the proof of beneficial use as required by Section 42-217, Idaho Code, and as required by a condition of approval on the permit.

4. The permit holder has not demonstrated that the Department made an error or mistake that would authorize the Department to reinstate the original priority date under the provisions of Section 42-218a, Idaho Code.

5. The purpose served by the Department's approval of the January 7, 1981 extension request was to provide additional time for the permit holder to develop the additional 120 acres authorized to be developed under permit no. 37-7460. If the Department had treated the extension request as a submission of proof of beneficial use under the permit, any opportunity for additional development under the permit would have been precluded. The Department cannot now characterize as error its action approving the extension request. To do so would have the effect of treating the January 7, 1981 filing as both an extension request and the submission of proof of beneficial use. The applicable statutes do not provide this option to either the permit holder or to the Department.

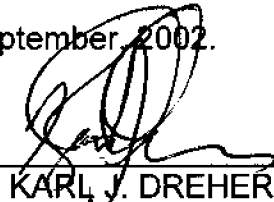
6. The Department is not authorized to reinstate the permit with the original date of priority and should reject the EXCEPTION TO PRELIMINARY ORDER and should deny the request for oral argument in the matter.

ORDER

IT IS HEREBY ORDERED, that Permit No. 37-7460 in the name of Frank and/or Josephine Astorquia is **REINSTATED** with the priority date advanced to July 3, 2002.

IT IS FURTHER ORDERED, that the request for oral argument before the Director in this matter is denied and the EXCEPTION TO PRELIMINARY ORDER filed by the permit holder is **REJECTED**.

Dated this 24th day of September, 2002.



KARL J. DREHER
Director